REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 152 OF 2016

ANNA NAMAE MASIBO.....PLAINTIFF

VERSUS

BENARD WASILWA WEPUKHULU.....DEFENDANT

AND

MARGARET ONYANCHI MALOBA

BRAMWEL GEDION SITUMA WASILWA

EDMOND KHAMSIN WASILW.A.....CO-RESPONDENTS

ELISHEBA NASIPWONDI KHAREMWA

R U L I N G

By her Notice of Motion dated 17th October 2020, **ANNAH NAMAE MASIBO** (the Applicant herein) sought the following orders: -

> **1. Spent**
>
> **2. Spent**
>
> **3. That an order do issue restraining the Respondents and Co – Respondents by themselves, their servants, workers, agents and whosoever from evicting the Applicant from the land parcels NO BOKOLI/BOKOLI/3296, 3297, 3298, 3299, 3300, 3301 and 3622 (originally BOKOLI/BOKOLI/692) and from entering therein and or interfering in any manner with the Applicant's use of the suit parcels pending hearing and determination of this suit.**
>
> **4. That an order do issue inhibiting the Respondent and Co – Respondents from transferring, sub – dividing and registration of any dealing with the land parcel NO BOKOLI/BOKOLI/3296, 3297, 3298, 3299, 3300, 3301 and 3622 (originally BOKOLI/BOKOLI/692) pending the hearing and determination of this suit.**
>
> **5. That the names of MARGARET ONYANCHI MALOBA, BRAMWEL GEDION SITUMA WASILWA, EDMOND KHAMSIN WASILWA and ELISIEBA NASIPWONDI KHAREMWA (intended 1st to 4th Co – Respondent) be enjoined in this case as Co – Respondents.**

The application is predicated on **Sections 3**, **3A** of the **Civil Procedure Rules**, **Order 8 Rule 3 Order 40 Rule 1** and **2** of the **Civil Procedure Rules** and **Sections 68** and **69** of the **Land Registration Act**. It is supported by Applicant's affidavit and the grounds set out therein.

The gist of the application is that the Applicant is in occupation of the land parcels **NO BOKOLI/BOKOLI 3296**, **3297**, **3298**, **3299**, **3300** and **3622** (herein the suit land and previously land parcel **NO BOKOLI/BOKOLI/692**) for the last 60 years being her only home. However, during the pendency of this suit, **BENARD WASILWA WEPUKHULU** (the Respondent herein) sub – divided the land parcel **NO BOKOLI/BOKOLI/692** to give rise to the suit land and new titles were subsequently registered in the names of the Respondent as well as **MARGARET ONYANCHI MALOBA**, **BRAMWEL GEDION SITUMA WASILWA**, **EDMOND KHAMSIN WASILWA** and **ELISIEBA NASIPWONDI KHAREMWA** (the proposed Co – Respondents herein) as per the annexed Certificates of Search. That whereas she is in occupation of the suit land, the Respondent and Co – Respondents have threatened to evict her and have the new titles transferred to third parties in an effort to further frustrate her suit. That although she has placed cautions on the suit land, she is apprehensive

that the Respondent and proposed Co – Respondents may apply for their removal hence the prayer for orders of inhibition against all the titles. There is therefore need to enjoin the proposed Co – Respondents in whose names the new titles have been registered so as to enable this Court to determine this dispute.

The application is opposed.

MARGARET ONYANCHI MALOBO the 1st proposed Co - Respondent herein has by her replying affidavit dated 17th November 2020 averred, inter alia, that she is the registered proprietor of the parcels **NO BOKOLI/BOKOLI/3622** and **3296** having acquired the same for valuable consideration in the year 2019 without any inhibition nor encumbrances thereon. That she is in occupation and possession thereof and was surprised in April 2020 to be served with an application in which the Applicant was seeking to enjoin her in **BUNGOMA ELC CASE No 143 of 2014 (O.S)**. That application was however dismissed by a ruling dated 29th June 2020. No appeal was filed against that ruling and this application is therefore res – judicata.

That the Applicant has not demonstrated that she has a prima facie case with overwhelming chances of success. Further, that the Respondent only obtained her title in 2019 and so an order for adverse possession cannot be made against her. That she is a bona fide purchaser for value and is therefore entitled to the use, possession and enjoyment of the land parcels **NO BOKOLI/BOKOLI/3622** and **BOKOLI/BOKOLI/3296**.

BRAMWEL GEDION S. WASILWA the 2nd proposed Co – Respondent also filed a replying affidavit in opposition to the application. He averred, inter alia, that the application is misconceived and is an abuse of the process of the Court. That he is the proprietor of the land parcels **NO BOKOLI/BOKOLI/3298** having obtained title thereto on 7th September 2018 and has been occupation thereof having planted sugar cane in the years 2018 and 2019. That the Applicant does not live on the land parcel **NO BOKOLI/BOKOLI/3298** and so the prayer that she should not be evicted does not hold. That there is no privity of contract between him and the Applicant and it would be a travesty of justice to restrain him from using or occupying his own land at the instance of a stranger. That a similar application was filed in **BUNGOMA ELC CASE No 143 of 2016 (OS)** but was dismissed. That the application does not meet the threshold for the grant of the orders sought and should be dismissed with costs.

EDMON KHAMSIN WASILWA the proposed 3rd Co – Respondent also described the application as misconceived and an abuse of the process of the Court. He averred in his replying affidavit that he is the proprietor of the land parcel **NO BOKOLI/BOKOLI/3299** and is therefore entitled to the possession, use occupation and enjoyment thereof. That the Applicant who is a total stranger to him neither stays nor works on the said parcel of land and this application is an ingenious attempt by the Applicant to assert rights over his land following a similar application in **BUNGOMA ELC CASE No 143 of 2014 (OS)** which was dismissed. That he only obtained title to the land parcel **NO BOKOLI/BOKOLI /3299** in the year 2018 and therefore no prescriptive rights can run against him.

ELISHEBA NASIPWONDI KHAREMA the proposed 4th Co – Respondent deponed in her replying affidavit dated 26th November 2020 that she had sued **BENARD WASILWA WEPUKHULU** (the Respondent herein) in **BUNGOMA ELC CASE No 143 of 2014 (OS)** where a consent Judgment was recorded on 10th May 2016 that led to the sub – division of the land parcel **NO BOKOLI/BOKOLI/692** and she is the proprietor of parcel **NO BOKOLI/ BOKOLI/3300** which is registered in her names. That if indeed the Applicant was on the land, she should have joined **BUNGOMA ELC CASE No 143 of 2014 (OS)** which was filed earlier than this suit. That there was no restriction placed on the original land parcel **NO BOKOLI/BOKOLI/692** and the proposed 4th Co – Respondent cannot be injuncted from entering her own land and neither should she be enjoined in this suit. That justice will not be done if an order of inhibition is placed upon the land parcel **NO BOKOLI/BOKOLI/3300** where she has lived since 1952 and this application should therefore be dismissed with costs.

The Respondent appears not to have filed any response to the application. That is not surprising as he has already sub – divided the original land parcel **NO BOKOLI/BOKOLI/692** and sold the resultant parcels to the proposed Co – Respondents herein.

Submissions were thereafter filed both by **MR BWONCHIRI** instructed by the firm of **OMUNDI**, **BW'ONCHIRI ADVOCATES** for the Applicant, **MR MURUNGA** instructed by the firm of **J. O. MAKALI & COMPANY ADVOCATES** from the proposed 1st, 2nd and 3rd Co – Respondents and **MS NANZUSHI** instructed by the firm of **LUCY NANZUSHI & COMPANY ADVOCATES** for the proposed 4th Respondent.

I have considered the application, the rival affidavits and annextures thereto as well as the submissions by Counsel.

The Applicant seeks the following three (3) prayers by her Notice of Motion dated 17th October 2020: **-**

1. **Temporary injunction**

2. **Order of inhibition**

3. **Order of joinder of Co – Respondents**

First, however this Court must address the issue as whether or not this application is infact res – judicata following my previous ruling in **BUNGOMA ELC CASE No 143 of 2014 (OS)** which involved the proposed 4th Co – Respondent (as plaintiff) and the Respondent (as defendant). In that suit the proposed 4th Co – Respondent and the Respondent had recorded a consent Judgment with respect to the original land parcel **NO BOKOLI/BOKOLI/692** on 9th May 2016. When she became aware of that consent, the Applicant filed a Notice of Motion dated 20th April 2020 in which the first prayer she sought was to be enjoined in that case. She also sought orders staying the execution of the consent Judgment, a review/setting aside of the same, the consolidation of **BUNGOMA ELC CASE No 143 of 2014 (OS)** and this case and also an order of temporary injunction and inhibition with respect to the suit land which are the same orders sought in this application. By a

ruling delivered on 29th June 2020, I dismissed that application principally because, **BUNGOMA ELC CASE No 143 of 2014 (OS)** had already been compromised following a consent Judgment recorded on 9th May 2016 between the proposed 4th Respondent and the Respondent herein and therefore there was no pending suit in which the Applicant herein could be enjoined. It followed therefore that the other remedies sought by the Applicant fell by the side. It is that ruling in **BUNGOMA ELC CASE No 143 of 2014 (OS)** which the intended Co – Respondents urge me to find renders this application res – judicata. And in further emphasizing that issue, their Counsel **MR MURUNGA** has submitted as follows in paragraph 6 of his submissions: -

> **"A party who comes to Court to seek an interim injunction is required to make full disclosure. In the instant case, the Applicant was fully aware of the fact that she had filed a similar application in BUNGOMA ELC CASE No 143 of 2014 seeking almost similar orders and the Court had dismissed the application. A party such as the Applicant, who conceals, suppresses or fails to disclose such relevant fact is not entitled to this Honourable Court's exercise of discretion in her favour."**

Counsel then cites the decision in **BAHADURALI EBRAHIM SAMJI .V. AL NOOR JAMAL & OTHERS 1998 eKLR** and concludes as follows: -

> **"The ruling in BUNGOMA ELC 143 of 2014 between the same parties over the same subject matter still stands. The application must fail."**

Counsel for the Applicant did not touch on the issue of res – judicata in his submissions.

As res – judicata is a complete bar to both suits and applications, it is important that I address it at the earliest opportunity because if it is up held, there will be no need to proceed further. I must therefore first interrogate whether infact my ruling in **BUNGOMA ELC No 143 of 2014 (OS)** renders this application res – judicata.

The doctrine of res – judicata is captured in **Section 7 of the Civil Procedure Act** in the following terms: -

> **"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."**

The **SUPREME COURT** considered the above provision in the case of **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .V. MAINA KIAI & OTHERS 2017 eKLR** and held that for res – judicata to apply, the following conditions must be satisfied conjunctively: -

> **1. The suit or issue was directly and substantially in issue in the former suit.**
>
> **2. That former suit was between the same parties or parties under whom they or any of them claim.**
>
> **3. Those parties were litigating under the same title.**
>
> **4. The issue was heard and finally determined in the former suit.**
>
> **5. The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.**

Expounding on the rationale of the doctrine of res–judicata, the **COURT OF APPEAL** pronounced itself as follows in the case of **JOHN FLORENCE MARITIME SERVICES LTD & ANOTHER V CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE & OTHERS 2015 eKLR**: -

> **"The rationale behind res – judicata is based on public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res – judicata ensures the economic use of Court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of Judgments by reducing the possibility of inconsistency in Judgments of concurrent Courts. It promotes confidence in the Courts predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res – judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."**

There is no doubt that the principle of res – judicata applies both to applications as it does to suits. In **UHURU HIGHWAY DEVELOPMENT LTD .V. CENTRAL BANK OF KENYA & OTHERS 1996 eKLR**, the **COURT OF APPEAL** after reviewing the jurisprudence in India and England, stated thus: -

> **"This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say, there must be an end to applications of similar nature; that is to say further, wider principles of res – judicata apply to applications within the suit. If that was not the intention, we can imagine that the Courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there**

ought to be an end to litigation. It is this precise problem that Section 89 of the Civil Procedure Act caters for."

Having considered the relevant law and precedents as well as my ruling in **BUNGOMA ELC CASE NO 143 of 2014 (OS)**, I am not persuaded that this application is res – judicata. The reasons are not difficult to discern.

Firstly, the Applicant was not a party in **BUNGOMA ELC CASE No 143 of 2014 (OS)** and neither was any of the parties therein pursuing a claim in common with her. In other words, none of the parties in **BUNGOMA ELC CASE No 143 of 2014(OS)** were her privy. Indeed, the Applicant's attempt to be enjoined in those proceedings was soundly dismissed by the Court in the ruling delivered on 29th June 2020. Explanation No 6 of **Section 7** of the **Civil Procedure Act** provides as follows: -

> **Explanation (6): "Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."**

There is nothing in the proceedings in **BUNGOMA ELC CASE No 143 of 2014 (OS)** which suggest that any of the parties therein was litigating over a right that was common to the Applicant herein. That explains why the Applicant moved to file this suit in her own names.

Secondly, before res – judicata can be successfully up – held, the issues being raised in the subsequent suit must have ***"been heard and finally decided"*** in the previous suit. A perusal of the ruling in **BUNGOMA ELC CASE No 143 of 2014(OS)** shows clearly that after the Court declined to enjoin the Applicant in that case, there was no basis upon which the claims for temporary injunction and inhibition could be considered. The Court did not therefore interrogate the issues of temporary injunction and inhibition in **BUNGOMA ELC CASE No 143 of 2014 (OS)**. It is not by coincidence therefore that throughout the 17-page ruling in that case, there is no mention of the locus classicus case of **GIELLA .V. CASSMAN BROWN AND COMPANY LTD 1973 E A 358** that lays down the principles that guide a Court considering an application for a temporary injunction or indeed any other case related to such a claim.

It must be clear therefore that the plead of res – judicata is not well taken for the reasons that the Applicant was not a party in **BUNGOMA ELC CASE No 143 of 2014 (OS)** but also, the issues being raised herein were neither ***"heard"*** nor ***"finally decided."*** There plea of res – judicata is therefore rejected.

I shall now consider the Applicant's Notice of Motion dated 17th October 2020 on it's merits.

Earlier in this ruling, I have identified the three (3) prayers that call for my determination. I must begin with the prayer for joinder because if I disallow it, then that will mark the end of the participation of the proposed Co – Respondents in this matter.

The basis upon which the Applicant seeks to enjoin the proposed 1st to 4th Co – Respondents in this suit is because they have been respectively registered as the proprietors of the land parcels **NO BOKOLI/BOKOLI/3622**, **3296**, **3298**, **3299** and **3300** which are resultant sub – divisions of the land parcel **NO BOKOLI/ BOKOLI/692** previously registered in the names of **BERNARD WASILWA WEPUKHULU** the Respondent herein. The proposed Co – Respondents confirm that they are the registered proprietors of the said sub – divisions but add that they are lawfully entitled to the said parcels of land. The Certificates of Search in respect of those titles further confirm that registration. Since the Applicant by her amended Originating Summons is laying claim to those parcels of land among others, it is infact in their own interests that they be enjoined in this suit so that they can protect their property.

Order 1 Rule 10(2) of the **Civil Procedure Rules** provides that: -

> **"The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary <u>in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added</u>."** Emphasis added.

The main purpose of joinder of parties is to avoid a multiplicity of suits and also enable those parties who have a stake in the matter in dispute agitate their claims, if any, to the subject matter. It must also be remembered that in any proceedings, the plaintiff is usually the **<u>dominus litis</u>** and can elect who to sue so long as he can obtain any relief from that person. In **CENTRAL KENYA LTD .V. TRUST BANK & OTHERS C.A CIVIL APPEAL No 222 of 1998 [2000 eKLR]**, the Court affirmed the guiding principles in amendment of pleadings and joinder of parties as follows: -

> **"All amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder, as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs."**

I have not heard the proposed Co – Respondents allege that any prejudice or injustice will be caused to them if they are enjoined in these proceedings. If anything, they should be the one imploring this Court to enjoin them in these proceedings because property registered in their names is the subject of this litigation and it may be taken away without them being heard.

In his submissions in opposition to the prayer for joinder, Counsel for the proposed 1st, 2nd and 3rd Co – Respondents has submitted as follows: -

> **"Though the Court has wide latitude to enjoin a party to any proceedings if the joinder would enable the Court effectively and exhaustively deal with the issue in the case, the circumstances herein do not warrant a joinder at all save to increase**

costs. The matter is commenced by way of an Originating summons pursuant to Section 7, 37 and 38 of the Limitation of Actions Act. The proposed Co – Respondents were registered between the years of 2018 and 2019. There is no way time could have run as against them. The prayers on this limb must also fail."

On her part, Counsel for the 4th Co – Respondent has submitted on the same issue as follows in paragraphs 11 and 17 of her submissions: -

11. "The Applicant has woken up from a deep sleep to discover that the suit land is no more and let her pursue the same through BENARD WASILWA WEPUKHULU the defendant instead of the Co – Respondents since the defendant remained with some land."

17: "The whole land parcel belonged to the defendant and he is the one who consented it to being given to the 4th Co – Respondent and there is no validity or justifiable means dragging her into an Originating Summons."

Of course whether or not the Applicant will be entitled to orders in adverse possession is an issue to await the trial herein. However, the answer to the above submissions is that change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession – **GITHU .V. NDEETE 1984 KLR 776**. Therefore, if adverse possession is proved, it will be inconsequential when the proposed Co – Respondents obtained their respective parcels of land.

The prayer seeking the joinder of the proposed Co – Respondents in this suit is well taken. I allow it.

With regard to the prayer for a temporary injunction pending trial, the principles that guide a Court are now well settled. In **GIELLA .V. CASSMAN BROWN AND COMPANY LTD** (supra), it was stated that a party seeking such a remedy should satisfy the following: -

1: Establish a prima facie case with a probability of success.

2: Such an injunction will not normally be granted unless the Applicant demonstrates that he will suffer irreparable injury that cannot be adequately compensated by an award of damages.

3: If in doubt, the Court will determine the application on the balance of convenience.

A prima facie case was defined in **MRAO .V. FIRST AMERICAN BANK OF KENYA LTD & OTHERS C.A CIVIL APPEAL No 39 of 2002 [2003 eKLR]** as follows: -

"…….. a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

In **NGURUMAN LTD .V. JAN BONDE NIELSEN & OTHERS C.A CIVIL APPEAL No 77 of 2012 [2014 eKLR]**, the Court stated thus: -

"We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title, it is enough if he can show that he has a fair bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

Finally, as was held in **FILMS ROVER INTERNATIONAL LTD .V. CANNON FILMS SALES LTD 1986 3 ALL E.R**, a Court considering such an application should take the route or course that appears to carry the lower risk of injustice should it turn out to have been ***"wrong."***

Order 40 Rule 1(1) of the **Civil Procedure Rules** which donates to Courts the power to grant a temporary injunction provides that: -

"Where in any suit it is proved by affidavit or otherwise –

a. That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders."

It is clear from the above that one of the grounds upon which an order of temporary injunction can issue is where it is established that the defendant is likely to dispose of the property in dispute in order to obstruct or delay any decree that may be issued against him. Whereas the Applicant claims that she is the one in occupation of the original land parcel **NO BOKOLI/BOKOLI/692** before the Respondent sub – divided it and transferred the resultant sub – divisions to the proposed Co – Respondents, their case is that they are the ones in occupation of their respective parcels of land.

In her affidavit in support of the amended Originating Summons and even in the first Originating Summons filed on 5th December 2016, the Applicant's case is that the original land parcel **NO BOKOLI/BOKOLI/692** belonged to her late husband **ANDREW SIMIYU KOMAS MASIBO** although the Respondent acquired it in 1983. That she has been in occupation of the suit land by virtue of her marriage to **ANDREW SIMIYU KOMAS MASIBO** since 1964. The Green Card to the original parcel of land **NO BOKOLI/BOKOLI/692** shows that indeed it was first registered in the names of **ANDREW MASIBO** on 26th October 1967 before it was transferred to the Respondent on 14th March 1981. The Respondent has himself in paragraphs 2 and 4 of his replying affidavit dated 24th October 2018 in response to the Originating Summons confirmed that he bought the original land parcel **NO BOKOLI/BOKOLI/692** from **ANDREW SIMIYU MASIBO** who was the husband to the Applicant. That demonstrates, prima facie, that the Applicant, by virtue of being the widow of the original owner of the land parcel **NO BOKOLI/BOKOLI/692** has an interest in the suit land and her claim has a probability of success. As was held in **NGURUMAN LTD .V. JAN BONDE NIELSEN** (supra): -

> **"The Applicant need not establish title, it is enough if he can show that he has a fair bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities."**

It is also instructive to note that on 6th March 2017 and prior to the sub – divisions of the land parcel **NO BOKOLI/BOKOLI/629** to give rise to the suit land, **MUKUNYA J** had granted the Applicant the orders sought in her Notice of Motion dated 5th August 2016. That application, according to the proceedings of 6th March 2017, was not opposed. The main order granted by the Judge was an interlocutory injunction in the following terms as per prayer No 3: -

> **3. "That an order do issue restraining the Respondent by himself, his servants, workers, agents and/or otherwise howsoever from evicting the Applicant from land parcel NO BOKOLI/BOKOLI/629 and from entering therein and/or interfering with the suit parcel in any manner pending hearing and determination of this suit."**

There is nothing to suggest that any appeal was filed against that order. I need to point out that from the documents filed herein, the land parcel was originally **BOKOLI/BOKOLI/692** and not **629** as per the order above. Since that application was not opposed, that can only be evidence that the Respondent conceded to the claim that the Applicant was in occupation of the original land parcel **NO BOKOLI/BOKOLI/692** and should not be evicted pending trial of this suit. Among the reasons why a temporary injunction is granted pending the trial of a suit is to prevent the Respondent from disposing or alienating the property in dispute before the trial is heard and determined. The fact that the original land parcel **NO BOKOLI/BOKOLI/692** was sub – divided during the pendency of this suit lends credence to the Applicant's fears that more alienation may be carried out unless the orders sought are granted.

On the issue of irreparable injury or loss that cannot be adequately compensated by an award of damages, the Applicant has pleaded both in the Certificate of Urgency and the substantive amended Originating Summons that she has been in occupation of the entire original land parcel **NO BOKOLI/BOKOLI /692** and the resultant sub – divisions which include the suit land since 1964 to-date which is well over 60 years and has a permanent residence thereon. That has of course been disputed by the proposed Co – Respondents who aver that the Applicant neither stays nor works on the suit land. Those will be issues for trial but at this stage, all that this Court has to consider, without making any final decision, is that the Applicant has a right ***"which has been or is threatened with violation."*** If indeed the suit land has been the Applicant's home for over 60 years and she is evicted therefrom before the trial only for the Court to find in her favour, that will certainly, in my view, amount to irreparable loss or injury that cannot be adequately compensated by an award of damages. The Applicant has therefore surmounted the second limb of the case of **GIELLA .V. CASSMAN BROWN & COMPANY LTD** (supra).

Finally, if I was in any doubt, which I am not, the balance of convenience would tilt in favour of the Applicant. This is because, generally, where there is evidence of occupation of land in dispute, it is prudent to stay any threatened eviction or alienation pending a full hearing – **EDWIN KIRUAI .V. PETER GICHOMO C.A CIVIL APPEAL No 256 of 2009**. See also **BETH KAARI & ANOTHER .V. M'RIMUNGA C.A CIVIL APPEAL No 352 of 2009**. And as was held in the case of **FILMS ROVER INTERNATIONAL LTD .V. CANNON FILMS SALES LTD** (supra), the lower risk of injustice, should I turn out to have been ***"wrong"***, dictates that I grant the prayer for temporary injunction pending trial. After all, in terms of time, the proposed Co – Respondents only acquired ownership of the suit land as recently as 2018 and 2019.

The prayer for temporary injunction is well merited. I allow it.

Finally, the Applicant also sought an order inhibiting the Respondent and proposed Co – Respondents from transferring, sub – dividing and registration of any dealing with the suit land. In submitting against the grant of this remedy, Counsel for the proposed 1st to 3rd Co – Respondents has alluded to the fact that the Applicant has already lodged cautions on the suit land and this prayer is therefore duplex and should fail. Counsel cited my ruling in **BUNGOMA ELC CASE No 143 of 2014 (OS)** where I said: -

> **"Having said so however, I notice from the Certificate of Searches in respect of land parcels NO. BOKOLI/BOKOLI/3297, 3298, 3299, 3300, 3301 and 3622 that the Applicant has infact already placed cautions thereon. They are therefore secured in favour of the Applicant."**

It must be remembered that those words were uttered more as a consolation to the Applicant since the Court had dismissed her application to be enjoined in **BUNGOMA ELC CASE No 143 of 2014 (OS)**. Those cautions had not been placed on the suit land on account of any orders of the Court. She had moved on her own to protect her interest in the suit land. The issue of the prayer for an order of inhibition

being duplex does not really arise because a party is entitled to employ all the available legal means to protect his or her interest in property that is in dispute until the issue of ownership is conclusively determined. And bearing in mind the fact that the original land parcel **NO BOKOLI/BOKOLI/692** was sub – divided during the pendency of this suit, the Applicant cannot be penalized for being extra cautious.

An order of inhibition is provided for under **Section 68(1)** of the **Land Registration Act** in the following terms: -

> **"The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge."**

An order of inhibition is similar to an injunction as it seeks to preserve the property in dispute pending trial. That explains why Counsel for the proposed Co – Respondents complains about duplicity. In determining whether or not to grant such an order, the Court will take into account the following: -

1. Whether the Applicant has good grounds for the grant of the order.

2. Whether the property in dispute is at risk of being alienated or transferred to the detriment of the Applicant.

3. Whether failure to grant the order may render the suit nugatory.

4. What prejudice, if any, will be occasioned to the Respondent.

5. The conduct of the parties.

That list is obviously not exhaustive. Each case must be considered on it's own peculiar circumstances. Taking all that into account and more so the fact that the original land parcel **NO BOKOLI/BOKOLI/692** was sub – divided and alienated during the pendency of this suit, there are good grounds to further inhibit any dealings with the suit land pending the hearing and determination of this suit.

The prayer for orders of inhibition are also well merited and I grant them.

Ultimately therefore and having considered the Notice of Motion dated 17th October 2020, I allow it in the following terms: -

1. MARGARET ONYANCHI MALOBA, BRAMWEL GEDION SITUMA WASILWA, EDMOND KHAMSIN WASILWA and ELISIEBA NASIPWONDI KHAREMA shall be enjoined in these proceedings as the 2nd, 3rd, 4th and 5th Respondents respectively.

2. The Originating Summons be further amended to reflect that joinder and the same be filed and served upon them and BENARD WASILWA WEPUKHULU (1ST Respondent) within 14 days of this ruling.

3. The 2nd, 3rd, 4th and 5th Respondents shall within 14 days of service upon them of the amended Originating Summons file and serve their responses and any documents.

4. BENARD WASILWA WEPUKHULU the 1st Respondent may, if he so wishes, file and serve any further affidavit and documents within 14 days of service upon him of the further amended Originating Summons.

5. Pending the hearing and determination of this suit, the 1st, 2nd, 3rd, 4th and 5th Respondents by themselves, their servants, workers, agents and whosoever are restrained form evicting the Applicant from the land parcels NO BOKOLI/BOKOLI/3296, 3297, 3298, 3299, 3300, 3301 and 3622 (originally BOKOLI/BOKOLI/692) and from entering therein and/or interfering in any manner with the Applicant's use of the suit parcels.

6. An order of inhibition is issued inhibiting the 1st, 2nd, 3rd, 4th and 5th Respondents, their agents or servants from transferring, sub – dividing and any registration of any dealings with the land parcels NO BOKOLI/BOKOLI/3296, 3297, 3298, 3299, 3300, 3301 and 3622 (originally BOKOLI/BOKOLI/692) pending the hearing and determination of this suit or until further orders.

7. The parties shall thereafter comply with all the pre – trial directions. The matter shall be mentioned before the Deputy Registrar on 24th March 2021 to confirm compliance.

8. Although directions were taken on 7th March 2018, that was before the 2nd, 3rd, 4th and 5th Respondents were enjoined. Fresh directions shall now therefore be taken on 24th May 2021 after which a hearing date will be taken.

9. The Applicant to ensure that this matter is heard and determined within 12 months of this ruling otherwise the temporary injunction shall lapse unless the Court orders otherwise.

10. Costs shall be in the cause.

Boaz N. Olao.

J U D G E

18th February 2021.

Ruling dated, signed and delivered at **BUNGOMA** this 18th day of February 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

Boaz N. Olao.

J U D G E

18th February 2021.